IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-984

BENJAMIN CARR, JR.,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Benjamin Carr, Jr., appellant in the court below, respectfully

prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on October 10, 1978, a motion for rehearing having been denied on November 28, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit, affirming the Petitioner's conviction in the United States District Court for the District of Connecticut, is set forth at page 1a of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit, affirming the Petitioner's conviction, was entered on October 10, 1978, and its order denying a timely motion for rehearing was filed on November 28, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

1. Does the Government's impeachment of an important defense witness in a criminal trial, by showing that the witness previously exercised his Fifth Amendment right of silence, deprive the defendant of a fundamentally fair trial?

STATEMENT OF THE CASE

Following a jury trial in the District of Connecticut, the petitioner was convicted of knowingly receiving firearms which had moved in interstate commerce, being himself a previously-convicted felon, in violation of 18 U.S.C. §922(h)(1). The Government claimed the receiving had occurred on August 17, 1976, when the petitioner allegedly picked up the weapons at a New Haven pawn shop.

The petitioner and several members of his family had been arrested later that day by New Haven police officers, while passengers in an automobile owned and operated by a girlfriend of the petitioner's son Dennis. The guns were in the automobile's locked trunk. All occupants of the automobile were charged with carrying firearms in a motor vehicle, a felony

under Connecticut law.

All the state charges were nolled the following winter, although under Connecticut law they were subject to being reopened until August 17, 1981. The petitioner was indicted on the federal charges on September 7, 1977.

James Aiken, the petitioner's nephew, was arrested by New Haven police along with the petitioner and his sons on August 17, 1976, and like them was charged with carrying in a motor vehicle the firearms which later became the subject of this prosecution. He testified at trial in the district court that the defendant's son, Dennis, had received the guns at the pawn shop, and that he had helped Dennis placed them in the trunk of the automobile in which all later were arrested.

Over defense objections, the Government

was permitted to impeach Mr. Aiken on cross-examination by showing that after his arrest he had not made a statement to the police or to any other law enforcement agency:

Q Did you ever tell the New Haven Police that it was Dennis that redeemed the pledges?

A I never talked to the New Haven Police.

Q You didn't talk to them?

A They didn't talk to me at all.

Q After the day of arrest, did you come forward --

MR. WILLIAMS: I object to that. I think that Counsel is straying into an area, the Fifth Amendment area.

THE COURT: It's overruled.

MR. WILLIAMS: I would like to be heard at sidebar.

THE COURT: Are you this witness' lawyer?

MR. WILLIAMS: No.

THE COURT: At recess, then.

Q Did you go to the police and tell them that Dennis was the one?

A I was working. I never had any other, anymore time. After they dismissed the cases, I thought it was long over.

Q How long after the arrest was this that they were dismissed?

A It was a while. Maybe five or six months.

Q During that time, did you go to the New Haven Police or to the Prosecutor or anyone and say it was Dennis?

A No.

Q You never did?

A No.

Q Didn't you ever go to anyone in the Bureau of Alcohol, Tobacco, and Firearms --

MR. WILLIAMS: If your Honor, please, I think it inconceivable to permit this to continue. It involves the most substantial problems of my client's right to presumption of innocence.

THE COURT: Your objection is overruled.

Q Would you like the question again?

A Say it again.

Q Did you ever go to anyone in the Bureau of Alcohol, Tobacco or Firearms and tell them that it was Dennis who redeemed these guns?

A But I never knew that the Bureau of Tobacco or whatever it's called was involved. This is the first time I

ever heard that.

Q Did you ever tell any law enforcement officer prior to today that it was Dennis that redeemed those guns?

A No.

At that point, the testimony of the witness ended and the jury was excused. The court and counsel then engaged in the following colloquy regarding the Government's cross-examination of Mr. Aiken:

THE COURT: Do you have anything, Mr. Williams?

MR. WILLIAMS: Yes, I move for a mistrial, or, if your Honor decides not to grant that, then, as a significantly less adequate alternative, to strike the objectionable portions of the Government's cross-examination of James Aiken, as a remedy to that testimony. Because Aiken was

a codefendant in the State firearms prosecution with Carr, it was improper for the Government, which was, over my timely objections, permitted to let the witness go on and impeach himself by showing that he had exercised his Fifth Amendment right to remain silent, during that prosecution, to refuse to speak to the police about the case. Such impeachment of a witness offered by the Defense, especially one related to the Defendant, according to the evidence before the jury, is grossly unfair and deprives the Defendant of a fundamentally fair trial, of his right to present witnesses on his own behalf, and of due process of law.

MR. HARTMERE: May I be heard briefly?

How Mr. Carr can be deprived of calling witnesses after the cross-examination of another witness is a little incomprehensible. I believe it was perfectly proper examination. Mr. Williams does not represent Mr. Aiken. Mr. Aiken gave up no constitutional rights. He still had his Fifth Amendment right and could have invoked it, if he wanted to. His testimony boomeranged. The rights of Mr. Carr being violated by Mr. Aiken's exercise of his rights do not apply to any law I know of. Mr. Aiken took the witness stand. And ours was a proper line of questioning. He came up with a totally new story, up to the dismissal of the charges. And it was totally proper to ask him if he ever told the story

before.

MR. WILLIAMS: It's never proper to impeach a witness by showing that, on a prior occasion, the witness invoked a constitutional right and that such impeachment infringes the right of the witness. Such an infringement results in injury to the person on trial who certainly has a right to object.

THE COURT: I don't believe any injury has been done. A motion for mistrial is denied, and the motion to strike is denied.

MR. WILLIAMS: You're denying the motion as to the witness relating to his invocation of his rights?

THE COURT: I didn't hear the witness say he had invoked any rights, and your request is denied.

Affirming the trial court's rulings, the Court of Appeals purported to distinguish this witness's failure to volunteer information to the police from a witness's prior express invocation of his Fifth Amendment privilege before a grand jury (App. p. 10a). Impeachment on the latter facts has long been held to constitute reversible error. E.g., United States v. Tomaiolo, 249 F.2d 683 (2d Cir. 1957). The Court of Appeals also attempted to distinguish impeachment of a defendant by showing his failure to volunteer information to the police, United States v. Hale, 422 U.S. 171 (1975), from similar impeachment of a defense witness (App. p. 10a).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE APPARENT INCONSISTENCY BETWEEN THE RULING BELOW AND THIS COURT'S HOLDINGS IN DOYLE V. OHIO AND UNITED STATES V. HALE.

Noting that "every post-arrest silence is insolubly ambiguous," 426 U.S. at 617, this Court held in Doyle v. Ohio, 426 U.S. 610 (1976), that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. Id. at 618. In United States v. Hale, 422 U.S. 171 (1975), analyzing "the probative value of silence before police interrogators," 422 U.S. at 177, this Court held that "[i]n most circumstances silence is so ambiguous

that it is of little probative force. Id. at 176. The Court continued: "Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference..." Id. at 180.

The only factual distinction between the present case and Doyle and Hale is that in this case James Aiken was a defense witness rather than the defendant himself. Aiken was more than an eye-witness, however. He was intimately associated with the petitioner himself. He was the

petitioner's nephew, his companion throughout the events at issue in the trial, and his co-defendant in the related state court prosecution. Thus, the prejudicial impact noted in Hale was particularly likely to spill over onto the defendant himself.

Like the defendants in Doyle and Hale, James Aiken was attacked by evidence of post-arrest silence. Moreover, his silence was with respect to the precise issue for which he was then being prosecuted -- knowingly having firearms in a motor vehicle. The testimony he offered at the petitioner's trial could have convicted him of the state charges. He was impeached for having failed to volunteer this information to the police after his arrest, to the prosecutors in state court during the several months his case was pending, and to any law-enforcement official during the

later period when his case was no longer pending but was subject to being reopened.

In many of its earlier cases, the Second Circuit itself had recognized that no realistic distinction can be drawn between defendants like those in Doyle and Hale and important defense witnesses like James Aiken in this case. United States v. Tomaiolo, supra; United States v. Glasser, 443 F.2d 994 (2d Cir.), cert. denied 404 U.S. 854 (1971); United States v. Natale, 526 F.2d 1160 (2d Cir. 1975), cert. denied 425 U.S. 950 (1976). The Fifth Circuit and Eighth Circuit have made similar rulings. United States v. Williams, 464 F.2d 927 (8th Cir. 1972); United States v. Rubin, 559 F.2d 975 (5th Cir. 1977).

The important issue presented by the present case needs to be resolved by this Court. The decision below places the

Second Circuit in conflict with itself, as well as in conflict with at least two other circuits. More importantly, the ruling below would limit the scope of this Court's holdings in both Doyle and Hale in a manner wholly inconsistent with their reasoning.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted:

JOHN R. WILLIAMS
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76—August Term, 1978.

(Argued September 12, 1978 Decided October 10, 1978.)

Docket No. 78-1168

UNITED STATES OF AMERICA,

Appellee,

—against—

BENJAMIN CARR, JR.,

Appellant.

Before:

SMITH, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal from a judgment of the District of Connecticut, T. F. Gilroy Daly, *Judge,* convicting defendant of his receipt as a convicted felon of firearms that had been shipped in interstate commerce, 18 U.S.C. §922(h)(1).

Affirmed.

JOHN R. WILLIAMS, Esq., New Haven, CT (Williams, Wynn & Wise, New Haven, CT, of counsel), *for Appellant.*

MICHAEL HARTMERE, Assistant United States Attorney, New Haven, CT (Richard Blumenthal, United States Attorney for the District of Connecticut, New Haven, CT, of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge*:

Benjamin Carr, Jr. appeals from a judgment of the District of Connecticut, entered after a jury trial before Judge T. F. Gilroy Daly, convicting him of one count charging him with receipt as a convicted felon of firearms that had been shipped in interstate commerce, in violation of 18 U.S.C. §922(h)(1),[1] for which he was sentenced to a term of 36 months pursuant to 18 U.S.C. §924(a). He contends that the judgment should be reversed on several grounds, including inadequate inquiry of jurors to determine possible bias or prejudice, erroneous evidentiary rulings, failure to give a "missing witness" instruction, and the denial of a motion to suppress certain firearms seized from an automobile in which appellant was a passenger. Finding no merit in these contentions, we affirm.

The record, viewed most favorably to the Government at this stage, reveals overwhelming evidence of appellant's guilt. On August 17, 1976, he went to a pawn shop in New Haven, Connecticut, known as De Simone's Jewelers or the Chapel Loan Company, where he redeemed and took delivery of four shotguns and two rifles previously pawned by him. Later that day, John Nilsson, an appliance repairman in the vicinity, advised the New Haven police that he had observed three black men, one of them carrying an armful of rifles and another what appeared to be a musical instrument case, leave a building on Chapel Street, New Haven, with a black woman and dump the guns into

1 Title 18 U.S.C. §922(h) provides in pertinent part:

"It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year, ...

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

the trunk of a dark reddish-brown automobile bearing Connecticut license No. HE 1229. These facts, including a description of the car and its occupants, were then broadcast in an alert to New Haven police cars. Earlier that day New Haven police had been told by their Department that appellant and his son were wanted for participating in a shooting on the previous evening and that warrants for their arrest were being requested.

New Haven Police Officer George Mingione spotted the automobile described in the alert, which was double-parked on Chapel Street. Police then closed in on the car, arrested appellant and his son on charges of reckless endangerment based on the previous night's shooting, removed the car keys from the ignition switch, opened the trunk and removed four shotguns and two rifles. The other occupants of the car were then arrested.

Appellant thereupon volunteered to Officer Mingione that the weapons belonged to him and that the others should not be arrested. After being advised not to make any further statement until he received *Miranda* warnings, which were then given to him, Carr stated that he understood his rights. He repeated that he was the owner of the firearms and had just taken delivery of them from De Simone's, which he asked the police to verify by taking him there. Appellant was again advised of his constitutional rights and taken at his request to De Simone's where Ernest Fiedler, an attendant in the pawn shop, confirmed appellant's statement that appellant had just taken the firearms out of pawn.

Upon being brought to New Haven police headquarters, where he read and signed a waiver-of-rights form, appellant again stated, this time to Detective De Nuzzo, that his companions should not be arrested since the guns belonged to him. Questioning was terminated when appellant asked

to talk with his lawyer. However, about an hour later appellant asked to see Officer Edward J. Fasano, whom appellant had on an earlier occasion assisted in recovering a gun, and volunteered that he (appellant) was the owner of the guns and had picked them up at a pawn shop before being arrested.

All six weapons seized from the automobile trunk had moved in interstate commerce and were operational. One of the shotguns, a Browning, bore the same serial number as one that had been redeemed by appellant at De Simone's, and one of the rifles, like one of those redeemed, was a .22 caliber.

The indictment, filed on September 7, 1977, charged appellant in one count with unlawful possession of four of the six weapons in violation of §922(h)(1). Following an evidentiary hearing upon appellant's motion to suppress the weapons and his inculpatory statements made to the police, Judge Daly on March 9, 1978, filed an opinion denying the motions. *United States* v. *Carr*, 445 F. Supp. 1383 (D. Conn. 1978). Judge Daly concluded that although the police did not have probable cause to arrest appellant for the previous evening's shooting incident, they did have probable cause to arrest him for unlawful receipt of firearms in violation of 18 U.S.C. §922(h)(1) and to search the car in which he was riding for firearms. Accordingly, he ruled that the arrest and search were valid on the latter basis, regardless of the inadequacy of the former, citing *LaBelle* v. *LaVallee*, 517 F.2d 750, 754 (2d Cir. 1975), and thus rejected appellant's claim that the inculpatory admissions were tainted by an unlawful arrest or search. Judge Daly further held that since the admissions were either volunteered or given after full *Miranda* warnings, they did not violate appellant's Fifth Amendment rights and

that they were given after waiver by appellant of his Sixth Amendment right to counsel.

At trial, in response to the overwhelming proof of his unlawful receipt of the firearms taken from the trunk of the car, appellant, testifying in his own defense, asserted that he neither touched nor took possession of the firearms but that they were taken from the pawn shop to the car by his son and nephew. He further denied making the incriminating admissions attributed to him by various witnesses. Appellant's son Dennis and his nephew, James Aiken, corroborated his version by testifying that the weapons had been received by Dennis, not appellant, on August 17, 1976. The jury, however, returned a verdict of guilty.

Discussion

Appellant first contends that the trial judge committed reversible error in refusing, after all of the defendant's peremptory challenges had been exhausted, to conduct a further inquiry of one juror, Mrs. Rhoda Podany, the wife of a Bridgeport Police Department detective, regarding her possibly having received information from her husband about the defendant, who had apparently been the subject of publicity years earlier arising out of a 1973 trial for bribery of a police officer and was known as "Fat Daddy." Appellant's suggestion that Mrs. Podany might have heard about the defendant from her husband was based on nothing but speculation. No publicity about the case or the defendant, much less any evidence that her husband knew anything about the defendant, was called to the court's attention.

When the jury was selected no members of the venire (which, having been drawn from Fairfield County, did not include anyone from New Haven, where appellant resides

and where the crime occurred) recognized appellant, either in person or by name. Moreover, Mrs. Podany unequivocally stated in response to questioning by the court that her husband's position would not influence her thinking and that she could decide the case fairly and impartially in accordance with the court's instructions as to applicable law. The court, after the jury had been impanelled and sworn, gave the usual instruction that jurors were not to read anything about the case, not to discuss it with anyone and that they were to report to the court any attempted discussion with them by others.

Following a five-day delay before commencement of trial, defense counsel suggested to the trial judge that Mrs. Podany be excused on the ground that her husband might have disclosed prejudicial information about appellant. Judge Daly denied this motion but did inquire of the jurors generally whether anyone had tried to approach any of them since they had been selected, to which no juror responded.

Appellant now contends that in response to his request the court should have further interrogated Mrs. Podany individually or the jury as a group as to whether she or other jurors had recently heard anything about the case or the defendant. As appellant concedes, however, Mrs. Podany "was not presumptively disquailfied" from the jury because of her status as the wife of a police detective.[2]

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2 The mere fact that a prospective juror is the spouse of a law enforcement official does not establish bias or disqualification from service, *Mikus* v. *United States*, 433 F.2d 719 (2d Cir. 1970) (former police officer, wife of a state police officer); *United States* v. *Hurd*, 549 F.2d 118 (9th Cir. 1977) (husband of IRS employee in prosecution for tax evasion); *United States* v. *Grismore*, 546 F.2d 844 (10th Cir. 1976) (wife of police officer); *United States ex rel. Cooper* v. *Reincke*, 219 F. Supp. 733 (D. Conn. 1963), *aff'd.*, 333 F.2d 608 (2d Cir.), *cert. denied*, 379 U.S. 909 (1964) (wife of police commissioner).

As to the conduct of voir dire, this is a matter lying within the discretion of the trial court, F.R.Cr.P. 24(a), and the trial court enjoys wide latitude in determining what questions to put to the veniremen. *United States* v. *Taylor*, 562 F.2d 1345 (2d Cir. 1977), *cert. denied*, 432 U.S. 909, 434 U.S. 853 (1977); *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir.), 423 U.S. 832 (1975); *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931). This discretion is "subject to the essential demands of fairness," 283 U.S. at 310. Although the trial court might have permitted Carr to seek evidence from Mrs. Podany in an effort to find a basis for disqualifying her for cause, *United States* v. *Jackson*, 542 F.2d 403 (7th Cir. 1976), or the trial judge might himself have inquired into possible sources of bias, *United States* v. *Zane*, 495 F.2d 683 (2d Cir. 1974), we cannot say that the court's failure to do so constituted an abuse of discretion. See *United States* v. *Perry*, 550 F.2d 524 (9th Cir.), *cert. denied*, 431 U.S. 918 (1977); *United States* v. *Grant*, 494 F.2d 120 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974). Judge Daly had warned the jurors against discussing the case with anyone, and he did ask them, after the five-day interval, whether anyone had approached them about the case. He could reasonably have concluded that under the circumstances this interrogation was adequate to uncover any improper communications about the case, especially since he could personally observe the jurors, including Mrs. Podany.

This case is clearly distinguishable from those relied upon by the appellant, where the court ruled that the trial judge was obligated to poll the jury about its exposure to prejudicial communications, since there was no actual evidence that prejudicial communications had occurred outside the courtroom. See, e.g., *United States* v. *Lord*, 565 F.2d 831, 838-39 (2d Cir. 1977).

Appellant next contends that the trial court erred in restricting his cross-examination of Fiedler, the employee of the pawn shop (De Simone's) who testified that on August 17, 1976, appellant redeemed and picked up the previously-pawned firearms, some of which became the subject of the indictment, and of Officer Fasano, who testified regarding one of appellant's post-arrest incriminating statements. We find no merit in this contention. Although defense counsel is entitled to reasonably wide latitude in testing a witness' credibility by cross-examination, *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974), the trial judge is also entitled to exercise sound discretion in determining the scope of such cross-examination in a specific case, Rule 611, Fed. R. of Evid.; *Glasser* v. *United States*, 315 U.S. 60, 83 (1942); *Alford* v. *United States*, 282 U.S. 687, 694 (1931).

Defense counsel's effort in the present case to induce Fiedler to characterize his own memory in a conclusionary fashion as not "good" was clearly objectionable. This was an ultimate issue to be resolved by the jury. Likewise it was improper to ask Fasano whether Carr's admitting possession of the guns "would be highly relevant to the case pending against him in the Court of Common Pleas" since this called for a legal conclusion. When the objection was sustained, defense counsel did not attempt to rephrase the question to avoid this problem. Moreover, Carr was not prejudiced by the exclusion of answers to these conclusory questions, since defense counsel had in previous questions eilcited the information that formed the basis for the desired inferences, and later in summation he asked the jury to draw the same conclusion from these relevant facts. Whether or not the trial court acted improperly in terminating as irrelevant further cross-examination of Fasano regarding his failure to inform state prosecutors about

PAGINATION IS INCORRECT,

BUT TEXT IS COMPLETE.

Carr's admission, we believe that "the total cross-examination was sufficient to afford the jury a basis to evaluate the defense theory." *United States* v. *Ong*, 541 F.2d 331, 342 (2d Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977).

Appellant next argues that the Government's efforts to impeach a defense witness by eliciting that he had remained silent about certain evidence prior to trial was improper. After appellant introduced the testimony of James Aiken, who was arrested with appellant and his son on August 17, 1976, to the effect that appellant's son Dennis, rather than appellant, was the person who redeemed the pledged firearms on that date, the Government upon cross-examination sought to impeach Aiken's credibility by eliciting from him that during the 19-month period following his arrest with appellant, Aiken had failed to volunteer this information to the authorities. Appellant contends that this line of questioning was prejudicial to him, since it in effect asked the jury to draw an adverse inference from the invocation of Fifth Amendment rights. See *United States* v. *Tomaiolo*, 249 F.2d 683, 690-92 (2d Cir. 1957). We disagree.

The issue raised by the appellant's contention, however, is not whether this line of questioning infringed the right of Aiken, or of appellant, to avoid self-incrimination. See *United States* v. *Hale*, 422 U.S. 171 (1975); *Minor* v. *Black*, 527 F.2d 1 (6th Cir. 1975). Aiken, not having invoked the Fifth Amendment privilege, was never questioned about invoking it. Moreover, appellant had testified at trial, so there was no danger that cross-examination of Aiken regarding his silence would suggest to the jury that the defendant was invoking his privilege. The trial court's decision to allow the cross-examination of Aiken, therefore, was not a constitutional error.

Whether or not the cross-examination of Aiken violated appellant's constitutional rights, he argues that it amounted to an evidentiary error, since Aiken's silence was inadmissible as a prior inconsistent statement. Rule 613, Fed. R. Evid. Some courts have recognized a witness' prior silence as an "inconsistent statement" for impeachment purposes. *United States* v. *Rice*, 550 F.2d 1364 (5th Cir. 1977), *cert. denied*, 434 U.S. 954 (1977); *United States* v. *Standard Oil Co.*, 316 F.2d 884 (7th Cir. 1963). Appellant, on the other hand, cites decisions holding that silence is ordinarily so ambiguous as to lack probative force. See, e.g., *Hale, supra; Tomaiolo, supra;* see also *Victory* v. *Bombard*, 570 F.2d 66, 70 (2d Cir. 1978) (quoting *Hale* that "in most circumstances silence is so ambiguous that it is of little probative force"). These cases, however, involve situations where, as in *Hale*, the witness was the defendant and had refused to speak in the exercise of his Fifth Amendment rights, or where, as in *Tomaiolo*, the witness was specifically questioned about an express assertion of his right against self-incrimination. In such cases the good faith assertion by a witness of his Fifth Amendment rights would ordinarily preclude an inference of inconsistency.

Applying these principles here, although an objection to Aiken's silence during the five or six months prior to dismissal of charges against him may have been upheld on the ground that it was not inconsistent with his willingness to testify at trial, it was not error under the circumstances to admit his silence thereafter as possibly inconsistent therewith and therefore relevant to his credibility. Moreover, aside from Aiken's volunteering at trial that he had no reason to believe that the matter with respect to Carr was being investigated further, defense counsel made no effort to mitigate whatever damage the questioning did to Aiken's credibility. Counsel could, presumably, have elicited from Aiken a further explanation

for his failure to volunteer his version of the facts prior to trial. Had counsel done so, we see no reason why the jury would not have assessed fairly the import of Aiken's silence and thus have rendered a reasoned decision as to his credibility. In short, the error, if any, was harmless.

We also find no merit in appellant's contention that the defendant was entitled to a "missing witness" instruction based on the Government's failure to call New Haven Police Officer Mingione, who arrested Carr on state charges on August 17, 1976. Since Mingione was not under the Government's control, was equally available to both sides, and his testimony would have been cumulative, the requested instruction was properly denied. See *United States* v. *DeLutro*, 435 F.2d 255, 257 (2d Cir. 1970), *cert. denied*, 402 U.S. 983 (1971). Moreover, the defense was aware on the first day of trial that Mingione would not be called by the Government.

Lastly, we find no merit, substantially for the reasons stated by Judge Daly, 445 F. Supp. 1383, in appellant's argument that the weapons should have been suppressed on the ground that the warrantless arrest of appellant on August 17, 1976, and the search of the automobile in which he was a passenger violated his constitutional rights. In considering the issue we proceed on the now well-established premise that the search of an automobile represents an exception to the general presumption against warrantless searches, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55 (1971), and may be conducted upon a less stringent showing of probable cause than would the warrantless search of a home, *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976); *Texas* v. *White*, 423 U.S. 67 (1975); *Cady* v. *Dombrowski*, 413 U.S. 433, 439 (1973); *Chambers* v. *Maroney*, 399 U.S. 42, 48 (1970); *United States ex rel. LaBelle* v. *LaVallee*, 517 F.2d 750, 755 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976), principally because of

the car's easy mobility and the lesser expectation of privacy on the part of the owner with respect to it than a home or office.

In the present case there was ample probable cause, even applying an "exigent circumstances" standard, for the search and arrest. Nilsson, a disinterested by-stander whose eye-witness account was first verified by a personal police interview, provided a detailed account of his observation of three black men and one black woman loading firearms into the trunk of the automobile on Chapel Street, which he identified in detail. The car was spotted by the police within a short time, double-parked only three blocks from the location where the guns had been loaded, under conditions reasonably justifying a suspicion that a robbery may have been in progress. Two occupants, one of whom, known to the local police, had been convicted of at least two felonies, were wanted for alleged participation in a previous evening's shooting.

These circumstances provided sufficient grounds for the reasonable belief that appellant, a convicted felon, had possession of firearms in the car and for the search of the automobile. Unless the car was searched immediately and appellant arrested, both might disappear. The legality of the seizure and arrest is not affected by the officer's failure to name the correct offense, *United States ex rel. LaBelle* v. *LaVallee, supra*, at 754, or the fact that the felony was a federal rather than a state one. *United States* v. *Danesi*, 342 F. Supp. 889, 892, n.1 (D. Conn. 1972). Since the search and arrest were lawful, appellant's various admissions made thereafter were properly received in evidence. Indeed at least some of them would have been independently admissible as volunteered by Carr after being fully advised of his *Miranda* rights. *United States* v. *Vigo*, 487 F.2d 295, 298-99 (2d Cir. 1973).

The judgment of conviction is affirmed.

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No. 78-984

In the Supreme Court of the United States

OCTOBER TERM, 1978

BENJAMIN CARR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-984

BENJAMIN CARR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in permitting the government to impeach a defense witness by eliciting that he had remained silent about certain evidence prior to trial.

1. Following a jury trial in the United States District Court for the District of Connecticut, petitioner, a previously convicted felon, was convicted of receiving firearms that had been shipped in interstate commerce, in violation of 18 U.S.C. 922(h)(1). He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 1a-13a).

As summarized in the opinion of the court of appeals (Pet. App. 2a-4a), the evidence showed that on August 17, 1976, petitioner redeemed four shotguns and two rifles that he had previously pawned at the Chapel Loan Company in New Haven, Connecticut. Shortly thereafter,

the police were notified that three men and a woman had been seen leaving a building on Chapel Street with an armful of rifles and that they had put the rifles into the trunk of an automobile bearing Connecticut license number HE 1229. A police officer spotted the automobile and arrested petitioner and his son, who were wanted in connection with a shooting that had occurred the night before. After a search of the trunk of the car revealed four shotguns and two rifles, the other occupants of the car, including petitioner's nephew, James Aiken, were arrested.

At the time of his arrest, petitioner volunteered to the police that the weapons belonged to him. After petitioner received *Miranda* warnings, he stated once again that he was the owner of the guns and that he had just picked them up at the pawn shop. At his request, petitioner was then taken to the pawn shop, where his admissions were confirmed by the clerk. Later, petitioner told a detective that the guns were his, and he repeated to another police officer that he had picked up the guns at the pawn shop prior to his arrest (Pet. App. 3a).

At trial, petitioner denied these admissions, contending that his son and nephew had taken the guns from the pawn shop. Petitioner's son and nephew corroborated this story. The prosecutor then cross-examined Aiken about his failure, during the 19-month period that followed his arrest, to disclose that he and petitioner's son, rather than petitioner, had picked up the guns (Pet. App. 10a).

2. Petitioner argues (Pet. 15-19) that the prosecutor's reference to Aiken's pretrial silence violated the rule of *Doyle* v. *Ohio*, 426 U.S. 610 (1976). That claim is insubstantial for the reasons stated by the court of appeals (Pet. App. 10a-12a), on which we rely. *Doyle* holds that impeachment of a *defendant* by reference to his silence after receiving *Miranda* warnings is improper, because *Miranda* warnings contain an implicit assurance that the arrestee's silence will not be used against him. 426 U.S. at

618-619. Here, however, the prosecutor inquired into Aiken's, not petitioner's, silence and therefore could not have infringed petitioner's Fifth Amendment rights. See *Couch* v. *United States*, 409 U.S. 322, 328 (1973); *Namet* v. *United States*, 373 U.S. 179, 185 (1963).[1] Petitioner, of course, did not remain silent after receiving *Miranda* warnings. In addition to volunteering statements at the time of his arrest, he testified extensively during trial.

Nor is there merit to petitioner's argument that the government's cross examination of Aiken conflicted with *United States* v. *Hale*, 422 U.S. 171 (1975). *Hale*, like *Doyle*, considered the evidentiary use of a *defendant's* post-arrest silence. The Court noted that the giving of *Miranda* warnings, together with the "inherent pressures of in-custody interrogation," frequently stripped a defendant's silence of probative value. 422 U.S. at 177, 180. Those factors are not present here. Aiken was not questioned about his silence during post-arrest, custodial interrogation. He was questioned about his continuing failure to disclose crucial information helpful to petitioner over a 19-month period, 13 months of which were after the charges against Aiken had been dismissed. In these circumstances, the court of appeals correctly concluded

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[1]Hence, the decision in *Doyle* does not apply to this state of facts. See 426 U.S. at 616 n.6. See also *id.* at 627 (Stevens, J., dissenting) ("a defendant may not object to the violation of another person's privilege").

that Aiken's silence was relevant to his credibility and was a proper subject for cross-examination (Pet. App. 11a). See, generally IIIA J. Wigmore, *Evidence* §1042 (1970 ed.).[2]

In any event, as the court of appeals held (Pet. App. 12a), even if the prosecutor's reference to Aiken's pre-trial silence was improper, it was harmless under all the circumstances. See *Namet* v. *United States, supra,* 373 U.S. at 189; *United States* v. *Glasser, supra,* 443 F. 2d at 1005-1006. Aiken's testimony was merely cumulative of the testimony presented by both petitioner and his son. In light of the "overwhelming evidence of [petitioner's] guilt" (Pet. App. 2a), the government's impeachment of Aiken did not affect the jury's verdict.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[2]The cases relied upon by petitioner (*United States* v. *Rubin,* 559 F. 2d 975 (5th Cir. 1977), vacated and remanded, No. 77-792 (Oct. 2, 1978); *United States* v. *Williams,* 464 F. 2d 927 (8th Cir. 1972); *United States* v. *Glasser,* 443 F. 2d 994 (2d Cir.), cert. denied, 404 U.S. 854 (1971); and *United States* v. *Tomaiolo,* 249 F. 2d 683 (2d Cir. 1957)) are not relevant here. In each of those cases the prosecutor cross-examined a defense witness about invocation of his Fifth Amendment privilege before the grand jury. In this case, as the court of appeals recognized, Aiken "was never questioned about invoking [the Fifth Amendment privilege]" (Pet. App. 10a). Moreover, while the assertion of the Fifth Amendment privilege by a grand jury witness may have little probative value, the situation here is quite different. As the court below observed (*id.* at 11a-12a), petitioner could have questioned Aiken about the reasons why he did not volunteer his version of the facts prior to trial.